

FILED

JUN 29 2005

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: *William*

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

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3	IN THE MATTER OF A MEMBER)	Nos. 04-0392, 04-1462
4	OF THE STATE BAR OF ARIZONA,)	
5	JOHN G. MORRISON,)	
6	Bar No. 006192)	
7	RESPONDENT.)	HEARING OFFICER'S REPORT
8	_____)	

PROCEDURAL HISTORY

Probable Cause Orders were filed on September 8, 2004 in 04-0392 and on November 19, 2004 in 04-1462. A two-count Complaint was filed on December 23, 2004. Respondent requested a short extension of time to file his answer, which was granted. Respondent filed an Answer on February 9, 2005. The Settlement Officer conducted a settlement conference on March 31, 2005, at which time the parties were unable to reach an agreement. A hearing was held on May 17, 2005: Bar Counsel, Respondent's Counsel and Respondent were in attendance. Additionally, Mary J. Foster, an Assistant Attorney General, attended in the capacity as a member of the public.

UNCONTESTED FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice law in Arizona on May 10, 1980.

COUNT ONE (File No. 04-0392 – Foster)

2. Respondent first began representing Mark Tave ("Mr. Tave") in 1999 in an appeal of a three-day suspension from Mr. Tave's employment with the Maricopa County Adult Probation Department ("Probation Department.") Respondent agreed to represent Mr.

1 Tave on a contingent-fee basis. (Joint Pre-hearing Statement filed of record on 5/20/05)
2 (“JPS”)

3 3. Teresa Wilson (“Ms. Wilson”), another of Respondent’s clients, was also Mr.
4 Tave’s friend. (JPS)

5 4. In 2001, Respondent filed a retaliation and wrongful termination lawsuit on
6 behalf of Mr. Tave in *Tave v. Maricopa County, et al., CV2001-004941*. The Maricopa
7 County Adult Probation Department was represented in the matter by counsel from the
8 Arizona Attorney General’s Office, Melanie Pate. (“defense counsel”) (JPS) (for this witness’
9 complete testimony, see Reporter’s Transcript., p. 110, lines 13-2; pp. 111-139)

10 5. While representing Mr. Tave, Respondent continued to represent Ms. Wilson in
11 one or more unrelated matters. (JPS)

12 6. Respondent also attempted to mediate a property dispute between Mr. Tave and
13 Ms. Wilson after the latter had Mr. Tave removed from her home in late 2001. (JPS)

14 7. While the Tave litigation proceedings were ongoing, and while the Respondent
15 attempted to continue to mediate the dispute between Mr. Tave and Ms. Wilson, Ms. Wilson
16 provided Respondent with information related to Mr. Tave’s misconduct while he was
17 employed by the Probation Department, including allegations of illegal drug use. (JPS)

18 8. During the attempted mediation, which included the exchange of property
19 between the parties, Ms. Wilson informed Respondent that the personal property belonging to
20 Mr. Tave but still in her possession could prove embarrassing for Mr. Tave. (JPS)

21 9. Respondent then terminated his involvement in the property exchange between
22 Mr. Tave and Ms. Wilson. (JPS)

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10. In defendant's disclosure statements of November 2002 and February 2003 pursuant to the Tave litigation, the State listed Ms. Wilson as a witness against Mr. Tave. Defense counsel indicated that Ms. Wilson would be testifying regarding Mr. Tave's performance of his job duties and other possible causes of his psychological condition. (JPS) (Reporter's Transcript, p. 112, lines 18-25; p. 113, lines 1-25; p. 114, lines 1-25; p. 115, lines 1-25; p. 116, lines 1-25; p. 117, lines 1-25; p. 118, lines 1-13)

11. Also in the February 2003 disclosure statement, defense counsel indicated that the defense was unaware of Ms. Wilson's address. (JPS) (R.T., p. 118, lines 1-8)

12. Defense counsel was unaware that Respondent represented both Mr. Tave and Ms. Wilson until August 2003, when Ms. Wilson personally contacted defense counsel and so advised her on the eve of the trial setting. (JPS) (R.T., p. 118, lines 17-25; p. 119, lines 1-22)

13. By letter dated September 12, 2003, defense counsel addressed the conflict with Respondent and requested that he withdraw from representing Mr. Tave in the litigation. (JPS) (R.T., p. 119, lines 14-25; p. 120, lines 1-14; State Bar's Exhibit 7)

14. Respondent did not voluntarily withdraw from the case and on October 9, 2003, defense counsel filed a motion to disqualify Respondent from representing Mr. Tave. (JPS) (R.T., p. 120, lines 17-25; p. 121, lines 1-8; State Bar's Exhibit 8)

15. In his response to the defense motion to disqualify him, Respondent suggested that he would not cross-examine Ms. Wilson during the Tave trial, but would instead only use Mr. Tave's direct testimony to rebut Ms. Wilson's testimony. (JPS) (R.T., p. 121, lines 9-19; State Bar's Exhibit 9)

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16. Defense counsel filed a reply to Respondent's response indicating the reasons why that would not be appropriate, attaching an affidavit from Ms. Wilson. (R.T., p. 122, lines 14-25; p. 123, lines 1-19; State Bar's Exhibits 10 and 11)

17. The Court, by minute entry dated November 12, 2003, indicated that it would be a violation of Ethical Rule 1.7 to allow Respondent to continue as Mr. Tave's attorney. (State Bar's Exhibit 12)

18. The Court also found that Respondent, by failing to disclose Ms. Wilson's whereabouts to the defense, had violated his duty to disclose under Rule 26.1(a)(4), Ariz.R.Civ.P. (State Bar's Exhibit 12)

19. As a sanction for the Rule 26.1 violation, the Court disqualified Respondent from further representing Mr. Tave in the matter. (State Bar's Exhibit 12)

20. Mr. Tave was unable to hire subsequent counsel in the matter, and the case was resolved when he stipulated to judgment in favor of the State. (R.T., p. 128, lines 10-23)

21. The Attorney General's Office incurred \$1,017.60 in expenses to find Ms. Wilson, due to Respondent's lack of disclosure. (Stipulated Post Hearing Addendum to Supplement the Record, State Bar's Exhibit 32)

COUNT TWO (File No. 04-1462 – Robberson)

22. Deborah W. Robberson, Deputy City Attorney for the City of Scottsdale ("Ms. Robberson"), reported to the State Bar that Respondent represented an individual named Terry Fritsch in the case of *Fritsch v. City of Scottsdale*, Maricopa County Superior Court Case No. CV2000-02110. (JPS) (State Bar's Exhibit 23)

23. Ms. Robberson reported to the Bar that Respondent had filed the suit on behalf of Mr. Fritsch and that she had defended on behalf of the City of Scottsdale. Ms. Robberson

1 reported that Mr. Fritsch had recently contacted her office and asked Ms. Robberson's
2 secretary about the settlement of his case. Mr. Fritsch stated that he had been out of Arizona
3 for more than a year and upon his return had contacted Respondent to find out the status of his
4 case. Respondent had told Mr. Fritsch that the case had settled for \$8,000 and that he
5 (Respondent) was waiting for the check from the City of Scottsdale to clear. Mr. Fritsch
6 found this suspicious that he did not have to sign off on the check and this is why he contacted
7 Ms. Robberson's office. (State Bar's Exhibit 23)

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9 24. Ms. Robberson reported having no independent recollection of any settlement and
10 noted that the City's file had been closed and sent to off-site storage. However, through the
11 Maricopa County Superior Court's website, Ms. Robberson's secretary determined that the
12 case was dismissed on January 2, 2002. Ms. Robberson's secretary also confirmed with the
13 City of Scottsdale Risk Management and Accounting Departments and confirmed that no
14 check had ever been issued to Respondent or Mr. Fritsch. (State Bar's Exhibit 23)

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16 25. In his response to the State Bar's charging letter regarding this incident,
17 Respondent admitted that he had misled his client about the status of the case against the City
18 of Scottsdale. (JPS) (State Bar's Exhibit 26)

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20 26. Respondent admitted that no settlement was ever made, nor were any funds ever
21 paid to Respondent or to Mr. Fritsch by the City of Scottsdale. Respondent paid Mr. Fritsch a
22 "settlement" amount directly out of Respondent's pocket. (State Bar's Exhibit 26)

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24 27. Respondent stated that he filed a claim with the City of Scottsdale on behalf of
25 Mr. Fritsch pursuant to A.R.S. §12-821.01, and when no settlement was forthcoming, the
26 lawsuit was filed. (JPS) (R.T., p. 14, lines 1-20; for Mr. Fritsch's complete testimony, see
R.T., pp. 79-109)

1 28. Respondent stated that discovery was undertaken, including the deposition of Mr.
2 Fritsch, and the matter was set for arbitration to be held in August 2001. However, before the
3 arbitration could be held, Mr. Fritsch began to suffer back problems. (R.T., p. 16, lines 6-20)

4 29. Respondent stated his file did not reflect a formal stipulation of the extension of
5 time for the arbitration, but he recalled discussing the matter with Ms. Robberson and
6 reaching an agreement that they would not proceed until the back problems were ruled out as
7 being a result of the fall. (JPS) (R.T., p. 17, lines 6-23)

8 30. Respondent reported that over the next several months, continuing into 2002, they
9 waited to determine the outcome of Mr. Fritsch's back injury. Mr. Fritsch required surgery,
10 which Respondent believes occurred in 2002, then Mr. Fritsch moved to Hawaii. (JPS) (R.T.,
11 p. 18, lines 2-24)

12 31. Respondent and Mr. Fritsch maintained telephone contact while Mr. Fritsch was
13 in Hawaii. (R.T., p. 18, line 25; p. 19, lines 1-14)

14 32. Respondent stated that in the late summer of 2002, after reviewing the medical
15 reports, it appeared highly unlikely that there was a causal connection between the fall and the
16 back injury, and that Mr. Fritsch agreed with that assessment. (JPS) (R.T., p. 20, lines 17-25;
17 p. 21, lines 1-4)

18 33. By this time, however, the case had been dismissed. (State Bar's Exhibit 31)

19 34. Although there is no documentation as to a formal offer from the City of
20 Scottsdale, Respondent recalls that the City offered approximately \$2,000 to settle the case.
21 (JPS)
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1 35. Respondent stated that he cannot find a copy of the Order of Dismissal dated
2 January 2, 2002, in his file and that it was not calendared in his system. (JPS) R.T., p. 17,
3 lines 24-25; p. 18, lines 1-9; p. 19, lines 19-25; p. 20, lines 1-13; p. 22, lines 1-5)

4 36. Respondent did not realize Mr. Fritsch's case had been dismissed until at least six
5 months later, well after the time for filing a Rule 60 or an A.R.S. §12-504 motion had expired.
6 (JPS) R.T., p. 22, lines 1-25)

7 37. Respondent continued to let Mr. Fritsch believe the case was pending, even after
8 Respondent was aware it had been dismissed. (R.T., p. 23, lines 1-25; p. 24, lines 1-25; p. 25,
9 lines 1-25; p. 26, lines 1-14)

10 38. Respondent prepared a fake accounting and a "release", indicating that the City of
11 Scottsdale had paid \$8,000 to settle the case. Both of these documents were created by
12 Respondent to continue to mislead Mr. Fritsch into believing that his case with Scottsdale had
13 settled and not been dismissed. (R.T., p. 26, lines 15-25; p. 27, lines 1-25; p. 28, lines 1-25; p.
14 29, lines 1-25; p. 30, lines 1-25; p. 31, lines 1-15; Respondent's Exhibits B and C)

15 39. Mr. Fritsch received a check from Respondent in the amount of \$4,900.88,
16 representing the "settlement" from the City of Scottsdale. (Respondent's Exhibit B; R.T., p.
17 31, lines 19-25; p. 32, lines 1-6)

18 40. Mr. Fritsch eventually found out about the misrepresentation when Bar Counsel
19 contacted him about this case. (R.T., p. 93, lines 21-25; p. 94, lines 1-19)

20 41. Respondent testified at length about his personal and emotional problems during
21 this time in his life, including getting divorced, taking care of his elderly mother, dealing with
22 his niece who began stealing from his mother, his paralegal of many years becoming ill and
23 his own health issues. (R.T., pp. 40-79)
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CONCLUSIONS OF LAW

1 The State Bar has proven, by clear and convincing evidence, that Respondent violated
2 Rule 42, Ariz. R. S. Ct., by violating the following Ethical Rules:

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4 **Count One:**

5 ER 1.7 (Conflict of Interest): by representing two clients with directly adverse
6 interests; Respondent also engaged in violations of the Arizona Rules of Civil Procedure
7 relating to discovery by concealing evidence and information from opposing counsel which
8 accordingly violated ER 3.3 (Candor Toward the Tribunal) and ER 3.4 (Fairness to Opposing
9 Party and Counsel), and that such conduct involved dishonesty, fraud, deceit or
10 misrepresentation in violation of ER 8.4(c) (Misconduct involving dishonesty) and that
11 Respondent's conduct in all the foregoing respects was prejudicial to the administration of
12 justice in violation of ER 8.4(d) (Misconduct prejudicial to the administration of justice).

13
14 **Count Two:**

15 ER 1.3 (Diligence): by failing to exercise reasonable diligence and promptness in
16 representing a client, by permitting client's case to be dismissed; ER 1.4 (Communications):
17 failing to keep a client reasonably informed about the status of a matter and failing to explain
18 a matter to the extent reasonably necessary to permit the client to make informed decisions
19 regarding the representation; ER 3.2 (Expediting Litigation): failing to make reasonable
20 efforts to expedite litigation consistent with the interests of a client; ER 8.4(c)(Misconduct
21 involving dishonesty): knowingly and intentionally engaging in conduct involving dishonesty;
22 and that Respondent's conduct in all the foregoing respects violated ER 8.4(d) (Misconduct
23 prejudicial to the administration of justice).
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ABA STANDARDS

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2 In determining the appropriate sanction, this hearing officer considered both the
3 American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and
4 Arizona case law. The *Standards* provide guidance with respect to an appropriate sanction in
5 this matter. The court and commission consider the *Standards* a suitable guideline. *In re*
6 *Peasley*, SB-03-0015-D, ¶¶ 23, 33 (Ariz. 2004). When a sanction is to be imposed in a case
7 in which there is more than one instance of misconduct, the *Standards* provide:

8 [t]he ultimate sanction imposed should at least be consistent with the sanction
9 for the most serious instance of misconduct among a number of violations; it
10 might well be and generally should be greater than the sanction for the most
11 serious misconduct. Either a pattern of misconduct or multiple instances of
12 misconduct should be considered as aggravating factors.

12 1991 *ABA Standards*, Theoretical Framework, p. 6; *see also* Disciplinary Commission
13 Report as adopted by Supreme Court of Arizona in *In re Redeker*, 177 Ariz. 305, 310, 868
14 P.2d 318 (1994)

14 (see discussion of aggravating factors, below).

15 ABA *Standard 3.0* provides the following factors to consider in imposing the
16 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or
17 potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or
18 mitigating circumstances. ABA *Standard 3.0*.

19 Given the conduct in this matter, the most serious misconduct is Respondent's
20 admitted misrepresentations to a client as set forth in Count Two. It is appropriate to consider
21 *Standard 4.0* (Violation of Duties Owed to Clients) and *Standard 4.6* (Lack of Candor), which
22 apply to cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward
23 a client. *Standard 4.62* provides:
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1 Suspension is generally appropriate when a lawyer knowingly deceives a
client, and causes injury or potential injury to a client.

2 Count Two also presents lesser violations in the nature of Respondent's failure to
3 exercise diligence in representing the client. *ABA Standard 4.43* provides:

4 Reprimand (censure in Arizona) is generally appropriate when a lawyer is
5 negligent and does not act with reasonable diligence in representing a
6 client, and causes injury or potential injury to a client.

7 With respect to Count One, the most serious misconduct was Respondent's
8 knowing failure to disclose information as to the whereabouts of witness Teresa
9 Wilson in violation of the discovery rules. *ABA Standard 6.13* provides:

10 Reprimand (censure in Arizona) is generally appropriate when a lawyer
11 is negligent either in determining whether statements or documents are
12 false or in taking remedial action when material information is being
13 withheld, and causes injury or potential injury to a party to the legal
proceeding, or causes an adverse or potentially adverse effect on the
legal proceeding.

14 Respondent also failed to avoid a conflict of interest, by continuing to represent both
15 Mr. Tave and Ms. Wilson. *ABA Standard 4.33* provides:

16 Reprimand (censure in Arizona) is generally appropriate when a lawyer
17 is negligent in determining whether the representation of a client may
18 be materially affected by the lawyer's own interests, or whether the
19 representation will adversely affect another client, and causes injury or
potential injury to the client.

20 With respect to Count Two, the more serious charge, Respondent intentionally and
21 knowingly deceived his client, Mr. Fritsch, for nearly two years by permitting Mr. Fritsch to
22 believe that his case against the City of Scottsdale remained pending and active when in
23 reality it had been dismissed due to Respondent's negligence. Respondent furthered this fraud
24 by preparing and presenting a false release for his client to sign. This is the classic case of the
25 "cover-up" being more serious than the "crime" itself. Had Respondent been candid with his
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1 client about the results of the case, at worst he would have been facing a sanction for mere
2 negligence due to his lack of diligence. Instead, he now faces suspension for perpetrating a
3 fraud on his client. The actual injury to Mr. Fritsch is both that it is unknown what he may
4 have recovered had the case not been dismissed due to Respondent's negligence, but also that
5 he had been lied to by his attorney for two years.

6 With respect to Count One, Respondent negligently believed that he was correct in
7 assuming that Ms. Wilson did not have any relevant knowledge regarding the *Tave* matter and
8 therefore did not need to give defense counsel her address. He also negligently believed that
9 no conflict of interest existed while he represented both clients. The Court in the *Tave* matter
10 found that Respondent violated his duty to disclose this information under Rule 26.1, as well
11 as his duty under ER 1.7, conflict of interest, and disqualified him from representing Mr.
12 Tave. The actual injury was both to defense counsel and Mr. Tave: defense counsel had to
13 expend funds to look for Ms. Wilson and Mr. Tave was unable to find replacement counsel.
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15 AGGRAVATING AND MITIGATING FACTORS

16 This Hearing Officer has considered aggravating and mitigating factors in this case,
17 pursuant to *Standards* 9.22 and 9.32, respectively. The aggravating factors as to both Count
18 One and Count Two are:
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20 1) 9.22(d): multiple offenses;

21 2) 9.22(i): substantial experience in the practice of law (Respondent had been a
22 member of the Bar in excess of 20 years when these violations occurred.)

23 The mitigating factors as to both Count One and Two are:

24 1) 9.32(a): absence of a prior disciplinary record (Respondent has no prior discipline
25 with the State Bar);
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1 2) 9.32(b): absence of a dishonest or selfish motive (as to Count One only);

2 3) 9.32(c): personal or emotional problems (*See* Stipulated Post Hearing Addendum to
3 Supplement the Record submitted June 15, 2005 by the parties which contains Exhibit F, a
4 letter from Marlene Shiple, Ph.D, Respondent's therapist. Respondent was going through a
5 divorce, was taking care of his elderly mother, including dealing with his niece who was
6 stealing from his mother, his paralegal of many years became ill; *See* also Exhibit E,
7 Respondent's child support order and decree of dissolution);

8 4) 9.32(d): timely good faith effort to make restitution or to rectify consequences of
9 misconduct (Respondent paid to Mr. Fritsch (Count Two) out of his own pocket what he felt a
10 realistic settlement amount would have been had the case not been dismissed, and this was
11 done prior to the Bar complaint);

12 5) 9.32(e): full and free disclosure to a disciplinary board or cooperative attitude
13 toward the proceedings (the parties agree that Respondent has been extremely cooperative
14 with the State Bar);

15 6) 9.32(g): character or reputation (see Stipulated Post Hearing Addendum to
16 Supplement the Record submitted June 15, 2005, by the parties which contains Exhibit G,
17 letters of character reference from two attorneys on Respondent's behalf);

18 7) 9.32(k): imposition of other penalties and sanctions (Respondent was disqualified
19 from representing Mr. Tave in Count One);

20 8) 9.32(l): remorse (Respondent has demonstrated clear remorse and genuine
21 embarrassment.)
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1 As the presumptive sanction in this matter is suspension, this Hearing Officer believes
2 that the mitigating factors in the case outweigh the aggravating factors to reduce the period of
3 suspension time imposed substantially.

4 **PROPORTIONALITY REVIEW**

5 To have an effective system of professional sanctions, there must be internal
6 consistency, and it is appropriate to examine sanctions imposed in cases that are factually
7 similar. *Peasley*, SB-03-0015-D, ¶¶ 33, 61. However, the discipline in each case must be
8 tailored to the facts of the individual case. *Id.* at ¶ 61 (citing *In re Alcorn*, 202 Ariz. 62, 76,
9 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983) and *In*
10 *re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993)).

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12 *In re Adair* resulted in an agreement between the attorney and State Bar for a
13 **censure and one year of probation**. SB-03-0116-D; DC No. 01-1671 (Arizona Supreme
14 Court Order dated 8/11/03). Mr. Adair had taken \$7500 from a client to file a habeas corpus
15 action for post-conviction relief; Mr. Adair failed to file that action and lied to the client
16 and the client's family on multiple occasions that he had filed the action. Mr. Adair also
17 did not refund the \$7500 until disciplinary proceedings had commenced. Negligence was
18 determined to be the lawyer's state of mind, with 1 aggravating factor, 9.22(h),
19 vulnerability of victim, and 4 mitigating factors: 9.32(a) absence of a prior disciplinary
20 record, 9.32(c) cooperative attitude, 9.32(d) timely good faith effort to make restitution, and
21 9.32(m) remorse.

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23 *In re Hooper* also was an agreement between the attorney and State Bar for a
24 **censure and one year of probation**. SB-04-0093-D, DC No. 02-0487 (Arizona Supreme
25 Court Order dated 7/22/04). Mr. Hooper represented a client who wished to have his past
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1 felony conviction expunged. The lawyer advised the client that he could have the
2 conviction expunged and his civil rights restored. Thereafter, the lawyer failed to take
3 diligent actions consistent with the client's representation; failed to respond to the client's
4 phone calls; failed to keep the client reasonably informed about the status of his case; failed
5 to comply with the client's reasonable requests for information; charged his client a fee for
6 which he did not perform a service; failed to respond to reasonable requests for information
7 by a disciplinary authority in the course of its investigation; engaged in a misrepresentation
8 by leading the client to believe he was performing work when he was not; and engaged in
9 conduct prejudicial to the administration of justice. (ERs 1.2, 1.3, 1.4, 1.5, 3.2, 8.4(c) and
10 8.4(d) and SCRs 53(d) and (f)).
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12 In *In re Arrick*, 180 Ariz. 136, 882 P.2d 943 (Ariz. 1994), the lawyer received a **4-**
13 **year retroactive suspension** in a case where he advised his client to plead no contest to
14 manslaughter and child abuse charges, lying to the client that he had conducted a thorough
15 investigation into her case and had consulted experts, but found no viable defenses. In
16 another case, Mr. Arrick failed to advise a client of potential adverse consequences, made
17 no inquiries into opposing party's claims for 3 years, lost important documents, filed suite
18 without conducting a proper investigation and exhibited a persistent pattern of insufficient
19 communications (in violation of DR 1-102(A)(4), DR 2-106(A), DR 6-101(A)(2) and DR
20 6-101(A)(3)).
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22 In a recent case dealing with conflict of interest and lying to a client, the lawyer
23 received a **1-year suspension** for violating ERs 1.2, 1.3, 1.4, 1.5, 1.7 and 8.4(c). *In re*
24 *Pulito*, SB-04-0134-D, DC No. 02-0588 (Arizona Supreme Court Order dated 1/10/05).
25 Mr. Pulito represented clients with whom he had a personal relationship, thereby creating a
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1 conflict of interest. He failed to discuss the conflict or obtain a written waiver, and he also
2 failed to file a lawsuit in a timely manner, then repeatedly deceived his clients about the
3 status of the matter when they inquired and billed them for work not performed to
4 perpetuate the deception. The clients involved were the lawyer's long-time friends and one
5 was the mother of the lawyer's child. Three aggravating factors were found: 9.22(b)
6 dishonest or selfish motive, 9.22(i) substantial experience in the practice of law, and 9.22(k)
7 illegal conduct. Two mitigating factors were found: 9.32(e) full and free disclosure and
8 cooperative attitude towards proceedings, and 9.32(m) remoteness of prior offenses (lawyer
9 had a remote prior disciplinary sanction).
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11 *In re Bihn*, DC No. 03-2158 is pending Supreme Court approval of the Disciplinary
12 Commission's report of April 22, 2005, which recommends approval of the Hearing
13 Officer's recommendation of a **60-day suspension**. Mr. Bihn failed to respond to a motion
14 for summary judgment regarding a counterclaim, and in the same case, later failed to
15 respond to a second motion for summary judgment on a claim resulting in the client's loss
16 of a whistle-blower wrongful discharge lawsuit. Mr. Bihn did not lie to the client, but did
17 lie to his law firm partners by failing to disclose the loss of the lawsuit when asked about
18 potential pending malpractice claims during his exit interview from the firm. Prior relevant
19 conduct included a prior failure to respond to a motion for summary judgment in another
20 case which resulted in Mr. Bihn's participation in a diversion program. There were three
21 aggravating factors: 9.22(b) dishonest or selfish motive, 9.22(c) pattern of misconduct, and
22 9.22(d) multiple offenses. There were six mitigating factors: 9.32(a) absence of prior
23 discipline, 9.32(c) personal or emotional problems, 9.32(d) timely good faith effort to make
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1 restitution or rectify consequences, 9.32(e) full and free disclosure/cooperative attitude
2 toward proceedings, 9.32(g) character or reputation, 9.32(l) remorse.

3 *In re North*, SB-01-0037-D, DC Nos. 94-1324, 95-0497, 97-2063 (Arizona Supreme
4 Court Order dated 3/28/01), is a **six-month and one-day suspension** case in which the
5 lawyer failed to provide information to allow clients to make informed decisions regarding
6 settlement, failed to convey settlement offers to all plaintiffs, failed to consult with clients
7 regarding their classification as plaintiffs, coerced some plaintiffs into settling, failed to
8 distribute award monies in a timely manner, failed to communicate with clients to respond
9 to reasonable client requests, failed to avoid conflicts that would impair the lawyer's
10 independent judgment and intentionally misled clients. Violations found included ERs 1.4,
11 1.7(b), 1.8(g), and 1.15(b). There were seven aggravating factors: 9.22(a) prior disciplinary
12 offenses, 9.22(c) pattern of misconduct, 9.22(d) multiple offenses, 9.22(g) refusal to
13 acknowledge wrongful nature of conduct, 9.22(h) vulnerability of victim, 9.22(i) substantial
14 experience in the practice of law, and 9.22(j) indifference to making restitution. There was
15 one mitigating factor: 9.32(j) delay in disciplinary proceedings.
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18 *In In re Yates*, SB-01-0127-D, DC No. 99-1645 (Arizona Supreme Court Order
19 dated 8/31/01), Mr. Yates was sanctioned to **6 months and 1 day suspension** after he
20 defaulted. Mr. Yates failed to act diligently, failed to expedite litigation, failed to
21 communicate with his client, made misrepresentations to the client concerning the status of
22 the client's case, engaged in conduct prejudicial to the administration of justice, delayed
23 returning his client's file and ultimately failed to return any substantive portion of the
24 client's file. Respondent also failed to respond to the State Bar's investigation. Violations
25 found included ERs 1.2, 1.3, 1.4, 1.16, 3.2, 8.1(b), 8.4(c), 8.4(d), SCR 51(h) and SCR 51(i).
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1 Four aggravating factors were found: 9.22(e) bad faith obstruction of the disciplinary
2 proceeding, 9.22(g) refusal to acknowledge wrongful nature of conduct, 9.22(i) substantial
3 experience in the practice of law and 9.22(j) indifference to making restitution. The sole
4 mitigating factor was 9.32(a) absence of a prior disciplinary record.

5 In the instant case, the State Bar is recommending that this Respondent be
6 suspended for at least six months and one day, and that the sanction is necessary to protect
7 the public, the integrity of the profession and the administration of justice. This would
8 place this case alongside the *North* and *Yates* matters, which is clearly not appropriate.
9 Although factually similar, *North* had seven aggravating factors, including prior discipline,
10 and only one mitigating factor. *Yates* had four aggravating factors, including obstruction of
11 the discipline process, and only one mitigating factor. In this case, this Hearing Officer
12 finds that there are two aggravating factors and eight mitigating factors, including an
13 extremely cooperative attitude during the disciplinary proceedings and the payment of
14 restitution to the client before the proceedings were brought by the Bar. Clearly this case
15 falls outside of the *North* and *Yates* parameters.
16
17

18 This case appears to fall somewhere between *Hooper* (censure), *Pulito* (one year
19 suspension) and *Bihn* (60 day suspension). Under ABA *Standard* 4.62 (cited above),
20 suspension is appropriate when a lawyer knowingly deceives a client, and there is injury or
21 potential injury. The presumptive sanction therefore must be suspension. In Count Two,
22 Respondent knowingly deceived Mr. Fritsch for nearly two years after the dismissal of Mr.
23 Fritsch's case, lying to him on numerous occasions and even preparing a phony release for
24 him to sign. Although it is extremely admirable that Respondent paid Mr. Fritsch
25 \$4,900.88 of his own money to try to make his client whole, he continued the deception to
26

1 the very end, allowing his client to find out about the misrepresentation from Bar Counsel.
2 In Count One, Respondent also committed discovery violations which resulted in direct
3 injury to his client. To Respondent's credit, he has a great deal of mitigation in his favor,
4 including a 20-year record with no discipline and complete cooperation with these
5 proceedings. This mitigation should reduce the amount of suspension imposed.

6 RECOMMENDATION

7 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public
8 and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320
9 (1993). It is also the objective of lawyer discipline to protect the public, the profession and
10 the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another
11 purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20,
12 29, 881 P.2d 352, 361 (1994).

13
14 In imposing discipline, it is appropriate to consider the facts of the case, the American
15 Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and the
16 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283,
17 286, 872 P.2d 1235, 1238 (1994). The presumptive sanction in this case is suspension.

18
19 Upon consideration of the facts, application of the *Standards*, including aggravating
20 and mitigating factors, and a proportionality analysis, this Hearing Officer recommends the
21 following sanctions:

- 22 1. Respondent shall be suspended for a period of sixty days.
- 23 2. Respondent shall be placed on probation for one year upon his reinstatement
24 to practice. Bar Counsel shall notify the Disciplinary Clerk of the date probation begins.
25 Probation shall include 6 additional CLE hours related to ethics.
26

